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No. 85-1782

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DEPAUW, PETITIONER

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that substantial evidence supported an arbitrator's decision upholding the International Trade Commission's determination that petitioner's work performance was unacceptable and the Commission's dismissal of petitioner from federal employment.

2. Whether the court of appeals correctly held that the performance standards under which petitioner was evaluated were sufficiently objective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 782 F.2d 1564. The opinion of the arbitrator (Pet. App. B1-B17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1986. The petition for a writ of certiorari was filed on April 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioner was first employed by the United States Tariff Commission—which became the United States International Trade Commission in 1974—in 1970 as a GS-11. He was promoted to GS-12 in three months and did satisfactory work until 1981. At that time, "the quality of his work and productivity began a downward spiral" (Pet. App. B3). His supervisor, using a set of performance standards developed in accordance with a performance appraisal plan that had been approved by the Office of Personnel Management (OPM), rated his work as "minimally acceptable" in June 1982. In November 1982 petitioner received an interim performance rating of "unacceptable." He agreed to a reassignment to another division under a different supervisor, Edith Hagelin, with a voluntary downgrade to GS-11, in April 1983. *Id.* at B3-B4.

In his position as a Commodity-Industry Analyst, petitioner's work was evaluated according to his performance on the four critical elements of that job.[1]

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[1] The four critical elements of the job are (Pet. App. B3):

1. Prepare and assist in the preparation of commodity investigations, analytical reports on findings and special project studies.

2. Develop and maintain technical and economic data on assigned commodities in order to identify and assess trade and tariff issues.

3. Advise division management on international trade matters and domestic industry issues.

4. Clearly and accurately communicate in written and/or verbal presentations.

Performance standards were developed describing "minimally acceptable" and "commendable" performance on each critical element. The performance standards for petitioner's job are reprinted at Pet. App. C1-C9.

In his first interim performance appraisal in February 1984, petitioner was given a rating of "unacceptable" by Hagelin. As the arbitrator noted, Hagelin's "whole report was replete with serious criticisms of [petitioner's] work" (Pet. App. B5). The evaluation of his performance on the first critical element, preparation of commodity investigations, "was severely condemnatory" (*ibid.*). The evaluation of his performance on the second critical element, development of data on assigned commodities, was also highly critical and included examples of more than 30 errors petitioner had committed. Petitioner was warned that his performance would have to improve within the next 60 days—the "opportunity period," which was extended to 91 days—or he would be demoted or removed. He was given a written list enumerating ways in which he could improve his performance (GX 2), and Hagelin urged him to work closely with her to improve his performance (Pet. App. B5). Petitioner admitted that he was "having difficulties with his job" (GX 19).

Petitioner's second-level supervisor, Walter Trezevant, testified at the arbitration hearing that he worked closely with Hagelin on petitioner's case during the opportunity period and that he met with petitioner nearly every other day (Tr. 123-125). Nevertheless, petitioner's work continued to be deficient (Tr. 123-130; GX 3). Near the end of the opportunity period, petitioner went on sick leave, from which he never returned.[2]

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[2] Petitioner explained his absence by sending the Commission a letter from a psychiatrist stating that petitioner had been under his care for several months for depression and a letter from an internist stating that petitioner had been under his care for treatment of severe migraine headaches (Pet.

2. In June 1984 the Commission issued a proposal to remove petitioner on the basis of his continued unacceptable performance. A hearing was held in August 1984 and the Commission notified petitioner that it would separate him on November 9, 1984. Petitioner filed a grievance which was denied by the Commission in December 1984. Petitioner then requested arbitration, contending, inter alia, that the Commission's decision to remove him was not supported by substantial evidence and that the performance standards under which he had been evaluated were defective.

After a hearing on April 15 and 16, 1985, the arbitrator rejected petitioner's claims (Pet. App. B1-B17). Two witnesses testified for the Commission, including Trezevant, who "was fully prepared to testify in depth about [petitioner's] work record and did so, credibly and at great length" (*id.* at B11). In addition, "a substantial body of documentary evidence offered by the Commission" was received as evidence (*ibid.*). Petitioner "offered no independent evidence whatsoever in support of his case-in-chief, as to his affirmative defense, or as to any rebuttal" (*ibid.*). The arbitrator concluded that the Commission's decision to remove petitioner was supported by

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App. B6). Petitioner subsequently submitted other letters from physicians to support his now-abandoned theory that he had a handicapping condition that the Commission should accommodate. His psychiatrist described him as suffering from " 'depression, extreme anxiety and great emotional instability,' as well as 'obsessive behavior' that is 'typical of this type of personality and emotional disorder' " (*id.* at B8). Other doctors stated that he suffered from "classic" migraine headaches "that usually lasted 24 to 48 hours and rendered [petitioner] unable to work during that period," and that he was being treated with an experimental drug (*id.* at B7-B8).

substantial evidence. Indeed, the arbitrator agreed with the Commission that "the decision to terminate [petitioner] was 'not merely grounded upon substantial evidence, but, rather based upon overwhelming evidence' " (*id.* at B12-B13).

The arbitrator also rejected petitioner's argument that the performance appraisal system under which he had been evaluated was defective. He noted that 5 U.S.C. 4302(b)(1) provides that agencies are required to establish performance standards "which will, *to the maximum extent feasible*, permit the accurate evaluation of job performance on the basis of objective criteria" (Pet. App. B13 (emphasis by the arbitrator)). The arbitrator rejected petitioner's contention that the performance standards developed to describe the critical elements of his GS-11 position were not defined in a sufficiently objective manner, stating that petitioner "did not have a routine job on a factory assembly line," but instead a position that "did not lend itself to the establishment of judgment-free, numerical standards" (*ibid.*). The arbitrator concluded that the OPM-approved system "was adequate by any standard" (*id.* at B14).[3]

3. The court of appeals affirmed (Pet. App. A1-A7). It first rejected petitioner's claim that the performance standards are not sufficiently objective. The court noted that petitioner "had to expect to be treated as a professional * * * whose work necessarily called for some subjective evaluation" (*id.* at A4). The performance standards under which he was evaluated " 'are sufficiently objective and pre-

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[3] The arbitrator added that the Commission had acknowledged that petitioner is now ill and had provided him with information on disability retirement (Pet. App. B17). See note 2, *supra*.

cise in the sense that most (professional) people will understand what they mean and what they require,' " the court concluded (*ibid.*, quoting *Wilson* v. *Department of Health & Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985)). The court added that petitioner's "[supervisors] filled him in, in detail, as to exactly what was demanded of him" (Pet. App. A4). It held that "[t]he performance standards * * * [meet] the statutory criteria" (*id.* at A5).

The court also rejected petitioner's argument that no substantial evidence showed that his performance had been unacceptable. The court noted that the Commission submitted "(a) documentary evidence consisting of Ms. Hagelin's detailed and specific interim appraisal of petitioner's work (in February 1984) as well as the detailed removal charges found as true by ITC, and (b) oral testimony of Mr. Trezevant * * * summarizing with specific examples the low-level of petitioner's work" (Pet. App. A5 (footnotes omitted)). The court, noting that petitioner did not even attempt to rebut the Commission's evidence, concluded that the arbitrator had correctly decided that the Commission had presented "overwhelming evidence" in support of its decision to terminate petitioner (*id.* at A5-A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends that under the court of appeals' decision "a federal employee may be removed from his job on the basis of detailed charges without evidence" (Pet. 3). Petitioner has grossly mischaracterized both the holding of the court of appeals and

the evidence presented to the arbitrator. The Commission presented extensive documentary evidence detailing petitioner's inadequate performance plus testimony from Trezevant, whom both the arbitrator and the court of appeals concluded was thoroughly familiar with petitioner's case.[4] As both the arbitrator and the court concluded, the evidence of petitioner's inadequacies was not merely substantial but overwhelming. The Commission also presented detailed charges, which should have assisted petitioner in presenting a defense, but petitioner presented no rebuttal evidence.[5] In these circumstances there is no warrant for this Court to review the court of appeals' decision that the Commission's decision to remove petitioner is supported by substantial evidence.

2. Petitioner also contends that the performance standards under which he was evaluated are not sufficiently objective because they "contain[] the * * * vague words 'usually,' 'few,' and 'most'" (Pet. 6). But, as the Federal Circuit has held, Congress intended federal agencies to have flexibility in devising performance standards, and the use of precise numerical standards to describe adequate performance in many positions would be "unrevealing, bizarre, or counter-productive" (*Wilson*, 770 F.2d at 1052). While the standards developed to describe adequate performance in the critical elements of petitioner's

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[4] The arbitrator noted that Trezevant, who was subjected to cross-examination, was the head of a division with only 17 employees (Pet. App. B11).

[5] The Federal Circuit has repeatedly concluded that failure to rebut a prima facie case is fatal to a dismissed employee's case. *Adams* v. *Department of Transportation*, 735 F.2d 488 (1984); *Schapansky* v. *Department of Transportation*, 735 F.2d 477 (1984), cert. denied, No. 84-258 (Nov. 13, 1984).

job attempt to define objective standards of performance, it would be absurd for them to be phrased, as petitioner argues they must, in terms of absolute quantities. Moreover, as the Federal Circuit has held (*Weirauch* v. *Department of the Army*, 782 F.2d 1560, 1564 (1986)), performance standards may be reviewed in conjunction with the counseling an employee received to determine whether the employee adequately understood what was expected of him. In this case, as the arbitrator and the court of appeals concluded, petitioner knew what was expected of him but nevertheless performed inadequately for an extended period. There is, therefore, no warrant for review of the court of appeals' determination that the performance standards under which petitioner was evaluated were sufficiently objective.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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